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No. 295.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

FLORENCE SAMUELS LANDRESS,
Petitioner,

versus

PHOENIX MUTUAL LIFE INSURANCE COMPANY
and
TRAVELERS INSURANCE COMPANY,
Respondents.

CONSOLIDATED CAUSES.

RESPONDENTS' REPLY BRIEF AFTER CERTIORARI GRANTED.

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I.

Plaintiff's Theory of "Accidental Result" as Contrasted With Result From "External, Violent and Accidental Causes."

Plaintiff's supplemental brief predicates claim for recovery (except as to the third counts) on the bare proposition that the happening of an accidental result, without more, makes a case. The brief inquires (p. 4):

> "How is it possible for any **result** to be accidental unless there is an element of the accidental in the **means** by which it is produced? * * *"

But the policy requirements are not satisfied with merely "an element of the accidental in the means." There must be bodily injuries **effected solely** by external, violent and accidental means or causes.

Stated otherwise, defendants did not insure against "accidental result," or "accidental death." The insurance in question was of a more restricted form, to wit, insurance against death resulting directly and independently of all other causes, from bodily injuries effected solely by external, violent and accidental causes. Coverage as to "accidental death" or "accidental injuries" is found in many statutes regulating workmen's compensation and in some forms of accident insurance, but it is not provided by the policies in suit. In renewed effort for support from the Barry case for the contention that the result is the criterion, plaintiff's supplemental brief asserts that (p. 5):

> "As said in the Barry case, the presumption or inference is that he intended and expected to land safely, and that he did not was an accident."

We find in the Barry case no such statement containing the words following the last comma in the above sentence. No presumption was indulged from the mere fact of the failure to alight safely. What the Court said, after referring to Barry's intention to do so, was this (131 U. S. p. 121):

"The jury were, **on all the evidence**, at liberty to say that it was an accident that he did not. The Court properly instructed them that the jumping off the platform was the means by which the injury, if any was sustained, was caused; that the question was, whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground; * * * that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."

The words "in a not unusual or unexpected way" (in the first statement of the rule) plainly modify the verb "employed" and not the preceding verb "follows" (**Caldwell v. Travelers Ins. Co.**, 305 Mo. 619, 39 A. L. R. 56). Therefore, if the act is voluntary and is executed in the **manner planned** it is not accidental however unexpected the **result** of that act may be.

The words "something unforeseen, unexpected, unusual" (in the second statement of the rule) conversely require that the **execution** of the act must be interfered with by some **unintended slip** or **mishap** before it can be called an "accidental cause."

If this Court's language could be made clearer, it would be by saying that if the intentional act is done in the usual

and expected way, the resulting injury is not effected through accidental means, even though such injury is entirely unusual and unexpected when viewed as a **result** of the means employed and the manner in which they were executed (Caldwell case, supra).

Plaintiff's contrary construction of the Barry case is in effect that proof merely of an unexpected result is ipso facto conclusive proof that such result was caused by external, violent and accidental means. We find no decision of a federal court to such effect. But there are decisions without number to the contrary. A list of the more important, with descriptive notes, is attached in an appendix hereto.

The two cases urged in plaintiff's supplemental brief as supporting her contention in this connection are **Norris v. N. Y. Life Ins. Co.** (C. C. A. 4), 49 F. (2d) 62, and **N. Y. Life Ins. Co. v. Gustafson** (C. C. A. 2), 55 F. (2d) 236.

In the Norris case the insured was unexpectedly shot and killed. And it was the **cause**, as distinguished from the result, that was considered and on affirmative proof found to have been accidental, since the shooting was entirely unexpected and unforeseeable. As stated in the portion of the opinion quoted by petitioner:

> "When his brother did shoot and kill him, it was within the meaning of the law an accidental **cause.**"

The cause (unexpected shooting) was not inferred from the resulting bodily injury, but was established by proof.

In the Gustafson case there was affirmative proof by stipulation that the insured, in all respects physically normal and fit for boxing, was killed in a friendly boxing match by a violent blow on his chin which broke his neck. The Court considered that a blow of such nature, received under such circumstances, was quite unforeseeable and unlikely to happen, hence accidental. But it further considered, in accordance with the stipulation, that it was only the force of the blow, with other external factors, which caused the injury. There was no suggestion that any of the causes contributing to the injury were not both external and violent. In fact, the existence of any internal or nonviolent cause, or mere condition of the body, was expressly negatived by the stipulated facts. Quoting from the opinion (p. 237):

> "The stipulated case further is that Gustafson 'was in perfect health, enjoyed exceptional strength and bodily vigor, and was in a trained and fit physical condition to engage successfully as a boxer in a boxing match.' That his death resulted, in the words of the policy, 'from bodily injury,' and that, in the further words of the policy, such injury was effected 'solely through external, violent * * * cause,' is equally clear. Therefore, the crucial question is: Was 'such bodily injury * * * effected through accidental cause'?"

Whereas in the cases at bar not only is there no allegation in the declarations that Landress on the day in question was physically normal, but the declarations expressly

allege (third counts) that he was abnormal and that his abnormal condition was one cause of his injury.

A blow on the chin is an "act," something that "happens" or "occurs" (in the language of the Barry case), which may be contrasted with an abnormality within one's body, which simply exists. The former may be an accident; the latter can be only a condition.

Reference has been made to the many cases (see appendix) of unexpected results from intentional acts, where the only "accidental" feature was internal, and recovery has been denied. We shall now discuss a few of those not mentioned in our earlier brief.

In **Carswell v. Railway Mail Asso.** (C. C. A. 5), 8 F. (2d) 612, the insured suffered acute dilation of the heart from exertion in cranking an automobile. There was no slip or involuntary movement in the act. The Court held that however unexpected or unintended the **result** may have been, it was not caused by "accidental **means**," saying (p. 612):

> "Where one voluntarily undergoes physical exertion, and nothing unexpected or unintended happens while he is doing so, the fact that such exertion unintentionally and unexpectedly causes injury does not make the **means** whereby such injury is caused, namely, the voluntary exertion, **accidental**. The physical injury caused by voluntary exertion or strain, which is unaccompanied by anything which is involuntary, unforeseen, and unusual, is not a result of 'ex-

ternal, violent and accidental means,' within the meaning of the instrument sued on."

In **New Amsterdam Casualty Co. v. Johnson**, 91 Ohio St. 155, 110 N. E. 475, insured, heated from horseback riding, took a cold bath, as he frequently did under similar conditions, but in the instance in question the bath unexpectedly caused a heart dilation and resulted in disability. It was held that since he took the bath voluntarily, to cool off, without slip or fall, with the water of the intended temperature, the unusual result was not occasioned by "accidental means."

The distinction in question was clearly set forth in **Rock v. Travelers Ins. Co.**, 172 Cal. 462, 156 Pac. 1029, where the insured, carrying a casket down a flight of stairs, died as result of a dilation of his heart from the strain. The Court said (p. 465):

"The policy, it will be observed, does not insure against accidental death or injuries, but against injuries effected by accidental means. A differentiation is made, therefore, between the result to the insured and the means which is the operative cause in producing this result. It is not enough that death or injury should be unexpected or unforeseen, but there must be some element of unexpectedness in the preceding act or occurrence which leads to the injury or death. Policies like the one before us have been before the courts in many cases, and the great weight of authority, we think, sustains the view which we have just expressed."

In **Lehman v. Great Western Acc. Ass'n.**, 155 Iowa 737, 133 N. W. 752, 42 L. R. A. (N. S.) 562, the policy insured "against the effects of personal injury caused solely by external, violent and accidental means," and the question was whether appendicitis due to the irregular condition of the muscles of the side because of their strain in bowling arose from accidental means within the terms of the policy. Denying recovery, the Court said:

> "The act of bowling in itself was not an accidental means, for it was voluntary. The act in itself did not cause the appendicitis. There is no evidence tending to show that **without the intervening accidental result of swollen and strained muscles**, causing friction of the appendix by their irregular action, the disability complained of could have resulted. The accidental means, therefore, causing the disability was **not** the **external and violent** act of bowling, but the **internal condition of swollen and strained muscles.** * * * Finally, it is to be borne in mind that in this case there is no evidence whatever of any slipping or falling, or of any straining of the muscles, other than the intentional strain put upon them in the voluntary and intentional act of bowling. Such a strain was not an accidental strain, and, if it produced an unintentional result and consequent injury, nevertheless the resulting injury, and not the means producing it, was accidental."

In **Kendall v. Travelers' Protective Assn.**, 87 Ore. 179, 169 Pac. 751, under a similar accident certificate, recovery was denied for unexpected infection following the inten-

tional pulling of a hair from the insured's chin. The Court said (p. 190):

> "We note that the defendant does not insure merely against injuries although they might constitute an unexpected effect. The damage, whether anticipated or not as a result, must have happened through accidental, violent and external means. **All three of these ingredients must unite** to form the cause of the subsequent hurt before there can be a recovery."

In **Martin v. Interstate B. M. A. Assn.**, 187 Iowa 869, insured, engaged in sorting marketable and unmarketable oranges, ate three of them and suffered acute indigestion, or gastritis, from which he died. Denying recovery under a certificate covering death "caused by accidental means," the Court said (p. 879):

> "As said before, the defendant died from gastritis, which is caused by the failure of food to properly digest in the stomach. To come within the policy, the injury to the stomach must be traceable to means which were purely accidental, and the disease must be a result of a direct injury to the organ affected thereby, through accidental means. If we were to hold in this case that the plaintiff could recover, then, under a policy containing provisions such as this policy contains, it would follow that, whenever anyone ate food that disagreed with him, or which failed to properly digest, and acute indigestion followed, his beneficiary would be entitled to recover the amount of premium provided in the certificate. This case is clearly

distinguishable from those cases in which the company was held liable where one ate food containing ptomaine poison, without knowledge of the fact that it contained ptomaine poison, and death resulted, not from the failure of the food to digest, but from the effect of the poison."

In **Salinger v. Fid. & Cas. Co. of N. Y.**, 178 Ky. 369, 198 S. W. 1163, under an accident policy with similar provisions, recovery was denied for loss of eyesight caused by a combination of an intentional voluntary act, in placing boxes on a high shelf, and an unknown abnormal condition of insured's eye, a foreign substance in the artery, causing embolus. The Court said (p. 371):

"It may be treated as established by the great weight of authority that an injury is not produced by accidental means within the terms of an accident insurance policy where it is the direct, though unexpected, result of an ordinary act in which the insured intentionally engages. The rule is stated as follows in 1 Corp. Jur., page 426:

"'If a result is such as follows from ordinary means employed voluntarily and in a not unusual or unexpected way, it cannot be called a result effected by accidental means.'

"In Clidero v. Scottish Acc. Ins. Co. (1892), 19 R. 355, 29 Sc. L. Rep. 303, Lord Adam said:

"'A person may do certain acts, the result of which acts may produce unforeseen consequences, and may produce what is commonly called accidental death, but

the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental. Now, if that is so, where does the question of accident come in here? There is no evidence that anything unusual or exceptional occurred as to the means or cause of this death. The man was just doing what he meant to do, and apparently a most unfortunate and unexpected result happened—the man's death.' "

In **Shanberg v. F. & Cas. Co.** (C. C. A. 8), 158 Fed. 1, the insured fell dead after carrying a door from one building to another, about three blocks. He had a weak heart, which gave way under the exertion. Denying recovery, the Court said (pp. 4-5):

" 'As we view the case there was no accident in the means through which the bodily injury was effected. It would not help any to call the injury itself—that is, the rupture of the heart—an accident. That was the result, and not the means, through which it was effected. Carrying the door, or, after putting it down, the act of filling his lungs with air by drawing a long breath, was the means by which the injury was caused. Both were done by the assured voluntarily, and in an ordinary way, with no unforeseen, accidental, or involuntary movements of the body whatever. There was no stumbling, slipping, or falling; there was nothing accidental in his movements any more than there would be in walking on the street, or passing down the steps of his house, during each of which he might have filled his lungs by drawing a long breath, and ruptured his heart. The policy does not

purport to be a contract of indemnity against death or injury by all means. The cause of death must in all cases, where it is sought to recover under the provisions above quoted, result directly, and independently of all other causes, from bodily injury sustained through external, violent, and accidental means, or the event is without the scope of the contract.' "

So, following the reasoning in the above opinion, it will not help to call the resultant illness and death of Landress an accident. That is not the means which effected the injury. The means which effected the injury that resulted was the exposure to the sun, which was not accidental.

And this distinction is clearly applicable to the "anaesthetic death" cases (**Order etc. v. Shane** [C. C. A. 8], 64 F. [2d] 55, and **Hesse v. Travelers Ins. Co.**, 299 Pa. 125, discussed in our original brief).

Mutual Life Ins. Co. v. Dodge (C. C. A. 4), 11 F. (2d) 486, and **Aetna Life Ins. Co. v. Brand** (C. C. A. 2), 265 Fed. 6, appear to be in conflict with what we maintain is the correct rule. The Dodge case, as well as the dictum from **Jensma v. Sun Life Ins. Co.** (C. C. A. 9), 64 F. (2d) 457, relied on in the petition and supporting brief, is based largely on a dictum in **Western Com. Trav. Assn. v. Smith** (C. C. A. 8), 85 Fed. 401. The illusory nature of that dictum was pointed out in **Pope v. Prudential Ins. Co. of America** (C. C. A. 6), 29 F. (2d) 185, thus (p. 186):

"In Western Commercial Travelers Ass'n v. Smith

(C. C. A. 8), 85 F. 401, language is used (page 405) which would indicate that the expected or unexpected nature of the result furnished a criterion for determining the accidental character of the cause. So far as it went to this extent, this comment was not required by the questions involved nor by the Supreme Court decision in the Barry case. The Smith case was one where the wearing of a pair of new shoes produced a skin abrasion which became infected, and this infection caused death. Of course, the wearing of the new shoes was intentional, but the skin abrasion was not. It was in itself an accidental result, but it then became the cause of the further injury, and thus was, quite plainly, an accidental cause. In so far as this case tends to confuse the distinction between accidental result and accidental cause, it will be noted that the same general subject was considered by the same Court in Shanberg v. Fidelity Co. (C. C. A.), 158 F. 1, 4, 19 L. R. A. (N. S.) 1206. Here the decision is rested upon the very distinction, and it is said that, though the injury itself might be called an accident, it could not be called the result of an accidental means. The case was one where the insured's heart was ruptured as the result of overexertion. The conclusion at least indicates that that Court did not continue to adhere to the criterion of the dictum in 85 Federal."

The soundness of the above observations was recently confirmed by the Court which had decided the Smith case. In **Order etc. v. Shane** (C. C. A. 8), 64 F. (2d) 55, holding that an "anesthetic death" (on facts substantially the same as in the Dodge case) was not effected, independently of all

other causes, through external, violent and accidental means, the Court said (p. 59):

> "The decision in the case of Western Commercial Trav. Ass'n v. Smith, 85 F. 401, 40 L. R. A. 653 (C. C. A. 8), cited by appellee, when regard is had to the facts involved, is not opposed to the foregoing; and the language in the opinion must be read in the light of the facts and confined thereto."

The foregoing, we submit, demonstrates the error in the construction of the Smith case by the Court in the Dodge case. And yet the latter cited as its only authorities, other than the Barry case, the Smith case and **Aetna Life Ins. Co. v. Brand** (C. C. A. 2), 265 Fed. 6. The Brand case ("*misplaced artery*") *in turn also was based in part on the same* misleading dictum from the Smith case. Further, it may be noted, the Court in the Brand case expressly recognized that its decision was squarely in conflict with **Smith v. Travelers Ins. Co.**, 219 Mass. 147, L. R. A. 1915 B 872 (discussed in our original brief, pp. 25-27), which it described as "a case more closely resembling in its facts the litigation at bar than any other called to our attention or known to us." The Court in the Brand case also recognized, contrary to the contention of plaintiff herein, that the cause and not the consequences must be the test (p. 8):

> "It is plainly true, and all the cases agree, that in construing this clause, so long found in accident insurance policies, it is the cause and not the conse-

> quence that must be regarded in fixing liability; but we are unable to perceive any reason why one causal element may not be found in the peculiarities, unknown to the sufferer, of his own body."

While agreeing with the former part of this statement, we submit the latter part is erroneous in overlooking the fact that each and every "causal element" must be not only accidental, but external and violent. "Peculiarities * * * of his own body" cannot in any sense be regarded as external or violent.

One of the instructions to the jury in the Barry case which obviously met with approval was the following (131 U. S., p. 109):

> "'If you find that injury was sustained, then the next question is: Was it effected through **external, violent and accidental means**? This is a pivotal point in the case, and therefore vitally important. **The means must have been external, violent and accidental.** Did an accident occur in the means through which the alleged bodily injury was effected?"

The policy allows the benefit only if the injury "is effected solely" through causes that are—

(a) External.

(b) Violent.

(c) Accidental.

Each cause relied on as such must have all three of these attributes. It is not sufficient that there be a combination

of causes each of which has one or more of such attributes, but none of which has all. And yet, boiled down, that is plaintiff's case. She urges two causes of the injury, to wit, (a) the sun, and (b) the condition of insured's body. (Even aside from the third count, the death necessarily was due in part to an internal condition of some sort, since the declaration expressly admits that the sun heat was not sufficient to kill insured in normal condition.) But now testing these respective causes we find:

(1) That the sun, and insured's physical exertions under its rays, while external and (we may assume) violent, were in no possible sense accidental. Insured's exposure thereto was not in any way unintended or unexpected. And it was not even to any degree involuntary (as in some of the sunstroke cases) since he was voluntarily proceeding in the sun to indulge in his golf purely as a pastime.

(2) That insured's abnormal physical condition, while unknown and hence to that extent accidental, if a mere condition can constitute an "accident" (which we deny), was in no possible sense either external or violent.

We may readily distinguish cases of unexpected and unforeseen injuries where all causes contributing to the injury are external. Such are cases of poison drunk unintentionally, infection by germs unintentionally introduced, and injuries of every nature caused by unintended external force without the intervention or co-operation of an internal cause or causes. Also may be distinguished certain

cases on policies insuring against injuries effected through "accidental means," but without the further restriction as to "violent" and "external." In **Lewis v. Ocean Accident etc.**, 224 N. Y. 18, relied on in the Brand case and in the cases at bar, the pertinent policy provision there referred only to "accidental means" without the requirement that such means be also external and violent. Furthermore, as shown in the discussion of that case in our original brief (pp. 10-11), the unintended introduction of the germ by a pricking of a pimple was undoubtedly accidental. That the Lewis case affords no support for liability based on an internal abnormal condition of the insured was pointed out in **Barnstead v. Commercial Travelers' etc.**, 204 App. Div. 473, 198 N. Y. S. 416, denying recovery on a policy against injuries "caused solely and exclusively by external, violent and accidental means," where the death resulted from the administration of a gas which, because of insured's hypersusceptibility (and hence "abnormal condition"), resulted fatally. After pointing out that the gas was administered just as intended, the Court said (198 N. Y. S., pp. 417-18):

> "There was nothing accidental in the means, but only in the result, which was occasioned by the condition of the insured (Appel v. Aetna Life Ins. Co., 86 App. Div. 83, 87, 83 N. Y. Supp. 238, affirmed 180 N. Y. 514, 72 N. E. 1139; Fane v. National Ass'n of Railway Postal Clerks, 197 App. Div. 145, 146, 149, 188 N. Y. Supp. 222).
>
> "This case is to be distinguished from Townsend

v. Commercial Travelers' Mut. Accident Assn. of America, 231 N. Y. 148, 131 N. E. 871, 17 A. L. R. 1001, in which the injury resulted from an infected needle, and **Lewis v. Ocean Accident & Guarantee Corporation, Limited, of London, England**, 224 N. Y. 18, 120 N. E. 56, 7 A. L. R. 1129, from an infected pin, in this: That, while the person had intended to use the instrument, he had not intended to use a poisoned instrument, and the injury was the direct and proximate cause (result?) of the poison on the instrument."

The argument based on the Dodge case, that the intentional administration of an anaesthetic is transformed into an "unintended act" because the body into which it is administered contains an unknown internal condition, although the act itself in all its physical aspects is exactly as intended, suggests the following inquiry: Suppose A sends to B a bill for services rendered by A to B. A thinks it will be cheerfully received, but the bill is so exorbitant that B, who has a peculiar abhorrence for bills, an idiosyncrasy, so to speak, goes into a frenzy and has an acute attack of indigestion. Is the act of A in sending the bill any the less intentional because of the unexpected effect it has on B?

II.

The Sunstroke Cases.

Plaintiff's supplemental brief cites **Richards v. Standard Accident Insurance Co.**, 58 Utah 622, 200 Pac. 1017, and

an annotation in 17 A. L. R. 1197 (which is supplemented in 61 A. L. R. 1197). We beg first to refer to the discussion of sunstroke cases in our original brief, pages 29-36, and the conclusion there asserted that, before exposure to the sun can be called an "external, violent and accidental cause" of death, it must be shown that the exposure itself was caused by an accidental event. Thus in the Richards case, supra, the duration of exposure to the sun was accidental, as result of mishap. Insured's trip in the desert turned out to be longer than he intended or expected, as result of misinformation as to distance and because horses which were expected for his transportation failed to arrive.

Plaintiff also cites **Lower v. Met. L. Ins. Co.**, ... N. J. ..., 168 Atl. 592. That case, in so far as it holds that death by sunstroke is effected solely by external, violent and accidental means, is in direct conflict with **Nickman v. N. Y. L. Ins. Co.** (C. C. A. 6), 39 F. (2d) 763 (certiorari denied), 282 U. S. 855, with **Paist v. Aetna L. Ins. Co.** (D. C. Pa.), 54 F. (2d) 393, and with all other federal cases dealing specifically with sunstroke (cited and discussed in our original brief, pages 29-35). The opinion in the Lower case, we submit, is difficult to follow in its logic as to "accidental result" and "accidental means," and it ignores the requirement in the policy that the means must be external and violent, as well as accidental. In considering the authorities on sunstroke it ignores the distinction between cases of voluntary and involuntary exposure, and between cases involving policies containing clauses ex-

pressly dealing with sunstroke, and those involving policies containing no such clause, but only the usual insuring clause. These observations, we believe, may be demonstrated by the following analysis of the authorities dealing specifically with sunstroke (which in part has been suggested by and follows the petition to rehear filed in the Lower case).

The view stated in the annotation in 17 A. L. R. 1197 is based on **Bryant v. Continental Cas. Co.**, 107 Tex. 582, and others which have followed it. Prior to the Bryant case it never was doubted that sunstroke was **not** sustained through accidental means. Since that case is responsible for a number of similar decisions, it may be proper to note the peculiar grounds on which the Court proceeded. The primary reason was that the policy there, although an accident policy, contained a specific clause relating to sunstroke (theretofore judicially regarded as a disease), creating a somewhat confusing situation that brought the Texas court to an illogical result. In addition to the conventional insuring clause the policy provided:

> "If sunstroke, freezing, or hydrophobia, due in either case to external, violent and accidental means, shall result, independently of all other causes, in the death of the insured within 90 days from the date of exposure or infection, the company will pay said principal sum as indemnity for loss of life."

Coming to determine the question whether the sunstroke

had been caused by accidental means, the Texas court referred to the Barry case and seized upon the expression "accidental" means "happening by chance; unexpectedly taking place; not according to the usual course of things, or not as expected," as being authority for the proposition that a sunstroke, when unexpected, was an injury by accidental means.

Aside from its erroneous interpretation of the Barry case, the decision in the Bryant case is that when an insurer has issued a policy which is ambiguous, the terms being such as to lead the average man to believe that coverage for injury as a result of sunstroke was given, such coverage will be enforced. We may not agree with the Texas court's application of the principle involved, but the correctness of the principle may be granted.

In **Continental Casualty Co. v. Bruden,** 178 Ark. 683, 11 S. W. (2d) 493, the form of the policy, though issued by the same company, was not exactly similar to that involved in the Bryant case. It provided for benefits if the injury should be effected by an "accidental event." A **result** may be an **event,** and the result under consideration, i. e., death by sunstroke, being unforeseen, may properly be considered as an **accident** and hence an **accidental event.** This does not in any way imply that the **result** or **event** was caused by **accidental means.**

Higgins v. Midland Casualty Co., 281 Ill. 431, 118 N. E. 11, follows the Bryant case. We need only point out that

the form of policy sued on and the salient facts were precisely the same as in the Bryant case.

In **Elsey v. Fid. & Cas. Co.**, 187 Ind. 447, 120 N. E. 43, the policy provisions practically parallel the Continental Casualty Company's form of policy. The decision follows that in the Bryant case. Besides, as the Court points out in the Nickman case, the exposure was involuntary.

In **Pack v. Prudential Cas. Co.**, 170 Ky. 47, 185 S. W. 496, the policy contained the usual insuring clause, but also provided that:

> "If **sunstroke**, caused by the direct effect of the sun's rays, or freezing * * * shall result directly, independently and exclusively of all other causes in the death of the insured * * * the company will pay * * * the principal sum."

Although the Court affirmed a judgment for the defendant on the ground that the evidence showed that death had resulted from pneumonia rather than sunstroke, a dictum indicates that the Court deemed sunstroke within the purview of the policy. We respectfully direct this Court's attention to the policy provisions quoted.

In **Mather v. London Guar. & Acci. Co., Ltd.**, 125 Minn. 186, 145 N. W. 963, the Court pointed out that the word "sunstroke," in an exception clause, was stricken out, and on the basis of the evidence which showed that, at the time the policy was issued, this word was stricken with the un-

derstanding that coverage for sunstroke was to be given, affirmed a judgment for the plaintiff. The only legal point in the case relates to the parol evidence rule. If the evidence was admissible a specific coverage was established.

Gallagher v. Fid. & Cas. Co., 148 N. Y. S. 1016, also contained express provisions for death resulting from sunstroke. The relevant terms of the policy were practically the same as those involved in the Bryant and Elsey cases. The following from the opinion will show why the Court thought liability should be imposed (p. 1019):

> "If the policy now under consideration, however, in its defining clause, sunstroke is included within the definition of 'bodily injury'; * * * if there must be a 'preceding accident,' and in consequence thereof subsequent exposure to the sun's rays or excessive heat, followed by the disease known as sunstroke, to come within the terms of this policy, then the clause in question would add little or nothing to the previous binding force of the policy, for the reason that the indemnity would be not for the sunstroke independently considered, but for the accident which preceded it, and for everything resulting therefrom, including such sunstroke. If the language is vague and indefinite, it must be construed most strongly against the insurer."

The above language is plain. The opinions in the Bryant and other cases are less lucid expressions of the same thought. Does this case sustain the proposition insisted upon by the plaintiff? We think not. In further reference

to defendant's contention that it was necessary for sunstroke to be caused by accidental means, the Court made the following significant observation (p. 1018):

> "If this policy had insured only against bodily injury sustained through accidental means, with no definition or qualification, there might be greater strength in such contention."

Continental Cas. Co. v. Clark, 70 Okla. 187, 173 Pac. 453, also involved Continental Casualty Company's particular form of policy. It falls in exactly the same category as the Bryant case.

Railway Official & Employees Acc. Ass'n. v. Johnson, 109 Ky. 261, 58 S. W. 694, is so readily distinguishable that comment is hardly necessary. The policy provided for a reduced liability in the event sunstroke was suffered "not in the line of duty." It was held that sunstroke suffered in the discharge of the insured's duties required the payment of full indemnity—a technical, but perhaps correct, decision.

It thus appears, aside from the unprecedented Lower case, that in every case in which recovery was permitted there was a mishap, or **the policy either contained a specific reference to sunstroke, or did not require that injuries or death be caused by accidental means.**

Now consider the cases in which recovery was denied.

In the early case of **Sinclair v. Maritime Passenger's**

Assur. Co., 3 El. & El. 478, the policy held by the insured **made no specific mention of sunstroke.** The Court, holding that "disease produced by the action of a known cause" cannot "be considered as accidental * * * unless * * * the exposure is itself brought about by circumstances which may give it the character of accident," denied recovery.

In **Dozier v. Fid. & Cas. Co.** (C. C. Mo.), 46 Fed. 446, the Court sustained a demurrer to the complaint. The policy in suit did not refer to sunstroke. It was in the usual form insuring "against bodily injuries sustained through external, violent and accidental means."

Nickman v. N. Y. Life Ins. Co. (C. C. A. 6), 39 F. (2d) 763, and **Paist v. Aetna Life Ins. Co.** (D. C. Pa.), 54 F. (2d) 393 (affirmed, 60 F. [2d] 476), have been discussed in our original brief. The policies there involved, as in the cases at bar, contained only the usual insuring clauses, with no reference whatever to sunstroke.

Continental Cas. Co. v. Pittman, 145 Ga. 641, 89 S. E. 716 (1916), held there could be no recovery even under the Continental Casualty Company form of policy when death was caused by sunstroke. The Court apparently was not confused by the policy, construing it in accordance with its express terms, and, we believe, correctly.

In **Semancik v. Continental Cas. Co.**, 56 Pa. Super. Ct. 392 (1914), the Pennsylvania Court reached the same conclusion as the Georgia Court in the Pittman case. The

form of policy in suit was the same and the facts were substantially similar.

In **Harloe v. California State Life Ins. Co.**, 273 Pac. 560 (Cal. 1928), the question was again whether or not double indemnity was payable. The additional coverage was payable:

> "In the event of death caused by bodily injuries effected exclusively and wholly by external, violent and accidental means."

The Supreme Court of California affirmed a judgment in favor of defendant.

If sunstroke, as the result of voluntary exposure, is held to fall within the purview of the ordinary accident policy or double indemnity rider, then, a fortiori, freezing should do so, for although sunstroke is a disease, freezing is an injury.

In **Inter-Ocean Cas. Co. v. Foster**, ... Ala. ..., 147 So. 127 (1933), the insured voluntarily exposed himself to severe weather for a considerable period of time. The Court reversed a judgment in favor of plaintiff, saying that freezing was "not of itself an accident, but becomes so only when joined with a fortuitous, unusual, unexpected circumstance or event."

In **Lenarick v. National Cas. Co.**, 25 Ins. Law Journal (N. S.), 71 (Minn. 1912), plaintiff sought to recover indemnity for freezing. The Court said:

> "There are doubtless cases holding sunstroke to be an accident within the terms of ordinary accident insurance policies, but unless it is suffered as the result of exposure, caused by some prior accident, the weight of authority and reasoning is to the contrary."

In **Troupe v. Benefit Ass'n of Railway Employes**, 231 N. W. 529 (S. D. 1930), the insured voluntarily remained exposed in cold weather after having fallen in a watery hold and wet his clothing. The Court was of the opinion that the resultant injury was not caused by "accidental means."

In **Tuttle v. Pacific Mutual Life Ins. Co.**, 58 Mont. 121, 190 Pac. 993, the evidence tended to prove that the insured had frozen to death, but there was no evidence as to the cause of his exposure to cold. The Court, reversing a judgment in favor of plaintiff, held that it was incumbent upon plaintiff to prove that death was caused by accidental means. Death from voluntary exposure to extremes of temperature is **not** accidental. On this point the opinion of the Court is as follows:

> "Death resulting from voluntary physical exertion or from intentional acts of the insured is not accidental, nor is the disease or death caused by the vicissitudes of climate or atmosphere the result of an accident."

We should also like the Court to consider the following cases which, for the sake of brevity, we shall not discuss

more fully. Suffice it to say, that in each plaintiff recovered when the insured sustained injuries or met death as the result of involuntary exposure. And in each case the Court correctly proceeded on the theory that it was essential that plaintiff prove that the injury or death was caused by accidental means, that is, that the exposure was caused by accidental means. Furthermore, in each case the Court decided, also correctly, that death or injury was in fact caused by accidental means.

Ashley v. Agricultural Life Ins. Co. of America, 217 N. W. 27 (Mich. 1928) (insured became lost while hunting deer in cold weather);

Continental Cas. Co. v. Hardenberg, 121 Miss. 1, 83 So. 278 (insured unable to extricate himself from a bog, died as a result of exposure);

N. W. Com. Trav. Ass'n v. London Guarantee & Acc. Co., 10 Manitoba 537 (1895) (the wagon in which the insured was traveling, in extreme cold weather, broke down).

We submit that the Lower case is unsound. Certainly it is in conflict with all federal decisions on sunstroke. We respectfully urge that the other cases, considered together, sustain the following propositions:

(A) When an insured meets death or sustains injuries as the result of voluntary exposure to extreme heat or cold, his policy providing coverage only in the event that death or injury is caused by external, violent and accidental

means and containing no reference of any nature to sunstroke or freezing, recovery must be denied.

(B) When, **although the exposure is voluntary**, the policy in suit embodies a specific clause with reference to sunstroke or freezing, tending to induce the belief that such injuries are covered, no matter how caused, such coverage may, under the doctrine of strict construction, be enforced.

The instant cases fall squarely within proposition (A) above.

Our review of the authorities has not included any cases under the Workmen's Compensation Laws. We do not consider such cases of any value because they depend entirely on statute, and do not involve the problem of causation by external, violent and accidental means.

Whether sunstroke is in any aspect a bodily injury as distinguished from disease is discussed in our original brief (pp. 30-36).

Respectfully submitted,

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APPENDIX.

Eng.—Clidero v. Scottish Acc. Ins. Co., 29 Scottish L. R. 303. (Displacement of colon and heart failure from pulling on stocking.)

Sinclair v. Maritime Pass. Assur. Co., 30 L. J. Q. 77, 9 W. R. 342. (Death from sunstroke.)

U. S.—Southard v. Railway Pass. Assur. Co. (D. C. Conn.) Case No. 13,182. 22 Fed. Cases 810. (Injury from jumping and running without stumbling, slipping or falling.)

National Ass'n of Ry. Post. Clerks v. Scott (C. C. A. 2), 155 Fed. 92. (Injury on shin, everything else left conjecture, held verdict should have been directed.)

Preferred Acc. Ins. Co. v. Patterson (C. C. A. 3), 213 Fed. 595. (Death from injury occasioned by slipping while cranking automobile. The Court stated if insured had not slipped and only done what he intended, the injury would not have been by accidental means.)

Maryland Casualty Co. v. Spitz (C. C. A. 3), 246 Fed. 817. (Death from voluntarily rubbing boil on neck with hand, permitting germs to enter.)

Travelers Ins. Co. v. Selden (C. C. A. 4), 78 Fed. 285. (Death from voluntarily running up a hill without stumbling or falling.)

Fidelity & Cas. Co. v. Stacey's Exs. (C. C. A. 4), 143 Fed. 271. (Death from blood poisoning resulting from insured voluntarily striking another.)

Lyon v. Travelers Protective Ass'n of America (C. C. A. 4), 25 Fed. (2d) 596. (Death by rupture blood vessel while driving automobile back into road from woods on dark night.)

Carswell v. Railway Mail Ass'n (C. C. A. 5), 8 F. (2d) 612. (Death from cranking car, resulting in dilation of heart, no slipping.)

Baldwin v. North American Acc. Ins. Co. (C. C. A. 5), 22 F. (2d) 111. (Total disability injury from voluntarily attempting to hold a car starting to move on jack.)

Westmoreland v. Pref. Acc. Ins. Co. (C. C. Ga.), 75 Fed. 244. (Death occasioned by voluntary administration of chloroform in the usual way.)

Pope v. Prudential Ins. Co. of America (C. C. A. 6), 29 F. (2d) 185. (Death from raising short pedicle so as to remove stone from kidney, no slip or mishap.)

Nickman v. New York Life Ins. Co. (C. C. A. 6), 39 F. (2d) 763. (Death from sunstroke.) Certiorari denied 282 U. S. 855.

Wallace v. Standard Life Ins. Co. (C. C. A. 6), 63 F. (2d) 211. (Death from ascending flight of stairs.)

Seipel v. Equitable Life Ins. Co. (C. C. A. 7), 59 F. (2d) 544. (Hernia from lifting wheel into place on autobile—no slip.)

Shanberg v. Fidelity & Cas. Co. (C. C. A. 8), 158 Fed. 1. (Death after carrying one end of door without stumbling or falling.)

Brown v. Maryland Cas. Co. (C. C. A. 8), 55 F. (2d) 159. (Hernia resulting from being shoved while sitting on bed.)

Order v. Shane (C. C. A. 8), 64 F. (2d) 55. (Death from voluntary administration of butyn.)

Hastings v. Travelers Ins. Co. (C. C. Wash.), 190 Fed. 258. (Death from voluntarily and intentionally raising up and down on arms of chair.)

Chase v. Business Men's Assur. Co. (C. C. A. 10), 51 F. (2d) 34. (Drinking contaminated water, causing typhoid fever.)

Ala.—Inter-Ocean Casualty Co. v. Foster, 147 Ala. 127. (Freezing from voluntarily exposing himself to cold.)

Stokely v. Fid. & Cas. Co., 193 Ala. 90, 69 So. 64. (Insured coughed, bursting stitches of wound occasioned by previous operation for appendicitis.)

Cal.—Rock v. Travelers Ins. Co., 172 Cal. 462, 156 Pac. 1029. (Death from carrying heavy casket downstairs, without slipping or stumbling.)

Olinsky v. Railway Mail Ass'n, 182 Cal. 669, 189 Pac. 835. (Death from voluntarily swimming upstream.)

Ogilvie v. Aetna Life Ins. Co., 189 Cal. 406, 209 Pac. 26. (Rupture by lurch of plow, not greater than ordinarily incident to plowing.)

Harloe v. California State Life Ins. Co., 273 Pac. 560. (Death by sunstroke.)

Bennetts v. Occidental Life Ins. Co. (Cal.), 178 Pac. 964. (Death by lifting pipe from sump hole, no slip.)

Conn.—Southard v. Railway Pass. Assur. Co., 34 Conn. 574. (Hernia from voluntarily jumping from car and running distance without stumbling or falling.)

Stanton v. Travelers Ins. Co. (Conn.), 78 Atl. 317. (Death from strain of carrying basket, resulting in second attack of appendicitis.)

Del.—Metropolitan Life Ins. Co. v. Landsman (Del.), 165 Atl. 563. (Injury of salesman in lifting sack of potatoes in usual course of employment. This case also holds contract must be construed according to established rules of law.)

Ga.—Cobb v. Pref. Mut. Acc. Ass'n, 96 Ga. 818, 22 S. E. 976. (Blindness, presumably occasioned by walking with heavy grips, without slipping or falling.)

Fulton v. Metropolitan Cas. Ins. Co., 19 Ga. App. 127, 91 S. E. 228. (Death from pulling and pushing boat from dry land into water. No involuntary muscular effort or exertion occurred in the doing of the act which preceded injury.)

Johnson v. Aetna Life Ins. Co., 101 S. E. 134. (Death from ruptured blood vessel sustained while changing automobile tires. No evidence of fall, slip or blow of any kind no presumption.)

Continental Cas. Co. v. Pittman, 145 Ga. 641. (Death from sunstroke.)

Ill. Globe Acc. Ins. Co. v. Gerisch (Ill.), 45 N. E. 563. (Death from voluntarily lifting box of cinders.)

Wayne v. Travelers Ins. Co., 20 Ill. App. 493. (Death from approved medical hypodermic injection of morphine.)

Crandall v. Continental Cas. Co., 179 Ill. App. 330. (Death from swallowing a piece of meat pie, complicated by choking and abscess. There is no liability if an existing condition contributes with the injury to bring about death.)

Ind.—Schmid v. Indiana Trav. Acc. Ass'n, 42 Ind. App. 483, 85 N. E. 1032. (Paralysis of heart from carrying grip upstairs in high altitude. Result of voluntary exertion or vicissitudes of climate or atmosphere, although unexpected and unforeseen, not due to accidental means.)

Husbands v. Indiana Travelers Acc. Ass'n (Ind.), 133 N. E. 130. (Death from rupture of blood vessel while shaking down furnace in usual manner.)

Ia.—Carnes v. Iowa Trav. Men's Ass'n, 106 Ia. 281, 76 N. W. 683. (Death from intentionally taking a known quantity of morphine, if insured intends to take amount she does take and misjudges effect, although unforeseen and unexpected, not due to accidental means.)

Feder v. Iowa State Trav. Men's Ass'n, 107 Ia. 538, 78 N. W. 252. (Death from rupture while reaching over chair to close shutters; no evidence insured fell, slipped, etc., or that anything occurred which was not foreseen, except rupture; not due to accidental cause.)

Smouse v. Iowa State Trav. Men's Ass'n, 118 Ia. 436, 92 N. W. 53. (Death from voluntary attempts to remove night shirt, not due to accidental cause.)

Lehman v. Great Western Acc. Ass'n, 155 Ia. 737, 133 N. W. 752. (Appendicitis occasioned by bowling without slipping or falling.)

Martin v. Interstate Business Men's Ass'n (Ia.), 174 N. W. 577. (Death from eating oranges while separating unmarketable from marketable ones. Held no element of accident in means causing bodily disorder.)

Ky.—Salinger v. Fid. & Cas. Co. of N. Y., 178 Ky. 369, 198 S. W. 1163. (Loss of sight while weakened from voluntary lifting of boxes. Held no accidental means.)

Bahre v. Trav. Protective Ass'n, 211 Ky. 435, 277 S. W. 467. (Injury from jolt from riding in automobile over rough road.)

Transylvania Cas. Co. v. Allen's Administrator (Ky. C. of A.), 209 S. W. 44. (Hernia increasing in size, contention necessarily accidental means. Held no accidental means.)

Mass.—Smith v. Travelers Ins. Co., 219 Mass. 147, 106 N. E. 607. (Death from meningitis occasioned by volun-

tarily sniffing medicine into nose, which, by reason of peculiar construction of bones in head, carried germs into brain.)

Henderson v. Travelers Ins. Co. (Mass.), 160 N. E. 415. (Infection from entering of water in eyes and ears while diving.)

Mich.—Ashley v. Agricultural Life Ins. Co. (Mich.), 217 N. W. 27. (Insured became lost while hunting in cold weather, because exposure accidental he recovered, but held freezing in and of self not accidental means.)

Minn.—Lenarick v. National Cas. Co. (Minn. 1911), 25 Ins. Law Journal (N. S.), p. 71. (There are doubtless cases holding sunstroke to be an accident within the terms of ordinary accident insurance policies, but unless it is suffered as the result of exposure, caused by some prior accident, the weight of authority and reasoning is to the contrary.)

Miss.—United States Cas. Co. v. Malone (Miss.), 87 So. 8[illegible] (Voluntary rubbing toe with towel.)

Mo.—Caldwell v. Travelers Ins. Co. (Mo.), 267 S. W. 90[illegible]. (Death from bowel obstruction after operation for hernia.)

Zach v. Fid. & Cas. Co. of N. Y. (Mo. Ct. App.), 272 S. W. 995. (Blood poison following voluntary extraction of tooth.)

Mont.—Tuttle v. Pacific Mut. Life Ins. Co., 190 Pac. 993. (Death from freezing—held it was incumbent upon plaintiff to prove accidental means. Death from voluntary exposure to extremes of temperature is **not** accidental. No presumption can be indulged in.)

N. Y.—Appel v. Aetna Life Ins. Co., 83 N. Y. S. 238,

affirmed 180 N. Y. 514. (Appendicitis from riding bicycle without fall or collision, caused by usual movement of psoas muscle.)

Niskern v. United Bro. of C. & J. of America, 87 N. Y. S. 640. (Disability caused by rupture of blood vessel from voluntary lifting, not accidental means.)

Fane v. National Ass'n of Railway Mail Clerks, 188 N. Y. S. 222. (Hernia while lifting mail bags in customary manner without having slipped or anything out of the ordinary happening.)

Barnstead v. Com. Trav. Mut. Acc. Ass'n, 198 N. Y. S. 416. (Died after taking gas for tooth extraction.)

Dinnie v. United Com'l Trav., 169 N. W. 811 (N. D. Sup. Ct. 1918). (The Court held a complaint containing no allegations that the death of insured was caused through external, violent and accidental means did **not** state a cause of action.)

Ohio.—New Amsterdam Cas. Co. v. Johnson, 91 Ohio 155, 110 N. E. 475. (Death from heart dilation occasioned by voluntarily plunging into cold bath.)

Pa.—Hesse v. Travelers Ins. Co. (Pa.), 149 Atl. 96. (Death due to hypersusceptibility to novocaine.)

Semancik v. Continental Cas. Co., 56 Pa. Sup. Ct. 392. (Death due to sunstroke.)

Conti v. Benefit Ass'n of Railway Employees, 158 A. 205. (Death following removing jack from locomotive, complicated with hernia.)

R. I.—Kimball v. Mass. Acc. Co. (R. I.), 117 Atl. 228. (Death due to germs entering through open boil. Held it should appear the cause or means governed the result and not the result the cause.)

S. C.—Young v. Continental Cas. Co., 122 S. E. 577. (Climbed ladder to get book from shelf, stinging pain in groin—no slip or fall.)

S. D.—Troupe v. Benefit Ass'n of Railway Employees (S. D.), 231 N. W. 529. (Insured voluntarily remained exposed to cold after falling in water hole.)

Tenn.—Stone v. Fid. & Cas. Co., 133 Tenn. 672, 182 S. W. 252. (Voluntary lifting of arm, causing loss of sight.)

Ramsey v. Fid. & Cas. Co., 143 Tenn. 42, 223 S. W. 841. (Death from injury to gum in voluntary act of pulling tooth.)